In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 991

JERRY G. SUMMERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the conviction without opinion (R. 1).

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1964. A petition for rehearing *en banc* was denied on January 13, 1965. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1965 (a Sunday). The petition for a writ of certiorari was filed on March 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

770-063—65

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in failing to declare, *sua sponte,* a mistrial or in failing to order, *sua sponte,* a severance of petitioner's case from that of his co-defendant.

2. Whether the district court's instructions on the defense of alibi were correct.

3. Whether petitioner received adequate representation from his two retained defense counsel at trial.

STATEMENT

After a trial by jury in the United States District Court for the District of Columbia, petitioner was convicted of two counts of robbery, two counts of assult with a dangerous weapon, and one count of carrying a dangerous weapon, in violation of 22 D.C. Code §§ 2901, 502, and 3204 respectively (Tr. 685–686). He was sentenced to imprisonment for a period of from two to seven years.

The sufficiency of the evidence is not questioned; it may be summarized as follows:

On July 28, 1963, as Ellis Levy, accompanied by his nephew, was opening his Washington, D.C., sandwich shop for the day's business, petitioner approached from behind, pushed Levy violently into the store, and then spun Levy around (Tr. 23–24, 27–28). Petitioner, who was wearing a stocking mask and carrying a nickle-plated revolver, stated, "this is a holdup, give me your money" (Tr. 24). He then took from Levy an attache case which contained $1,800, and forced Levy and his nephew to face the wall (Tr. 24–25). Levy attempted to turn around, whereupon petitioner

struck him from behind with the revolver and caused him to fall to the floor (Tr. 25).

When Levy's brother, Sidney, arrived at the store a few minutes later, he too was accosted by petitioner, spun around, and told to "get in there and give me your money" (Tr. 26, 36, 55–56). Sidney Levy dropped an attache case containing about $1,300, which petitioner retrieved (Tr. 57). Petitioner then forced the Levy brothers and the nephew to go to the back of the store, and fled with the two attache cases and the money they contained (Tr. 26, 57).

Witnesses saw petitioner running from the store, carrying the two brown attache cases, and also saw him remove the stocking mask and transfer one of the attache cases to another person about two blocks from the sandwich shop (Tr. 64–70, 84–89, 117–118). Petitioner was then seen entering a white Ford automobile with one of the attache cases, while petitioner's companion entered another automobile with the other attache case (Tr. 85–89, 145). One or two hours later (Tr. 148, 158), other witnesses saw petitioner meet with his co-defendant, James A. Garrett,[1] and transfer two brown attache cases from a white Ford to Garrett's automobile (Tr. 149–150, 226–230). Both cars then drove away without petitioner, who walked off (Tr. 152).

Petitioner was arrested on September 2, 1963, and was later identified at police lineups by both of the

[1] James A. Garrett, also charged in the five counts of the indictment, successfully moved for acquittal as to all counts at the conclusion of the government's case (Tr. 570). Petitioner's similar motion was denied (Tr. 571–573).

Levy brothers and the other witnesses (Tr. 27, 46, 60, 86–87, 153, 229–230, 291).

ARGUMENT

1. Without having raised either issue at trial or before the court of appeals, petitioner now asserts that the trial judge erred in failing *sua sponte* to declare a mistrial or order a severance (Pet. 9–12, 14). He argues that he was entitled to such relief because: (1) co-defendant Garrett's counsel conducted most of the cross-examination of government witnesses and elicited testimony which did not concern petitioner; (2) Garrett's counsel compelled the government to produce the stocking mask and introduce it in evidence; and (3) Garrett was acquitted at the conclusion of the government's case (Pet. 9–10). There was, however, no conflict of interest between petitioner and co-defendant Garrett. Petitioner's defense was that of alibi. Garrett's defense was that: (1) the witnesses were mistaken in their identification of petitioner, and since petitioner did not commit the crime, petitioner's meeting with Garrett was innocent; or (2) the witnesses were mistaken in their identification of Garrett. Neither of Garrett's defense theories conflicted with petitioner's defense of alibi, and one of them—mistaken identification—supported petitioner's defense.

While counsel for Garrett did conduct most of the cross-examination of government witnesses, the examination consisted of an attempt to show that petitioner did not commit the robbery, or that the individual to whom petitioner later transferred one of the attache

cases was not Garrett (Tr. 37–48, 53–54, 95–119, 122–133, 134–144, 158–201, 205–217, 236–253, 254–260, 312–317, 332–349, 394–403, 405–408, 409–425, 455–461, 466–467, 504–506, 536–544). Consequently, such cross examination was not harmful to petitioner's defense. If it tended to show that petitioner was not the individual who committed the robbery, it supported petitioner's defense of alibi; and if it tended to show that Garrett was not involved at all, it was neutral vis-a-vis petitioner's defense. Petitioner's two defense counsel concentrated their cross-examination on testing the identification testimony of the witnesses and probing the accuracy of the witnesses' memories (Tr. 28–33, 62–63, 69–72, 89–95, 154–156, 225, 260–265, 354–364, 544–545).

Production of the stocking mask, and its introduction in evidence, was not in any way improper. As indicated above, Garrett's counsel was attempting to show that petitioner was not the individual who robbed the Levy brothers, and to the extent that he attacked the government's theory regarding the use of the stocking mask, he developed a line of defense helpful to petitioner.

The directed acquittal of Garrett at the conclusion of the government's case in no way prejudiced petitioner. At most, it was merely a determination that the government's evidence of Garrett's involvement was not sufficient to go to the jury, and did not aggravate or enhance petitioner's degree of involvement in the offense. The judge instructed the jurors not to speculate about the reasons for Garrett's acquittal, and advised them that Garrett's acquittal had no bear-

ing on petitioner's case (Tr. 584). This admonition was repeated in the general charge to the jury (Tr. 675–676).

2. The trial court instructed the jury that petitioner's defense was that of alibi, and then defined alibi as meaning the assertion that petitioner did not commit the crime and was not present at the scene of the offense when it was committed (Tr. 681). The court briefly mentioned the evidence petitioner had presented in support of his alibi (Tr. 681). It had previously instructed that the government had the burden of proving its case beyond a reasonable doubt and that the burden is never on the defendant to prove his innocence (Tr. 669–671). Under these circumstances, there was no requirement that the judge instruct on the degree of proof required to establish an alibi defense. *Goldsby* v. *United States,* 160 U.S. 70, 77. This is the rule which the District of Columbia has adopted for itself, (*Guthrie* v. *United States,* 207 F. 2d 19 (C.A.D.C.)) as a matter of local law.[2] See *Fisher* v. *United States,* 328 U.S. 463, 476.

3. Petitioner's allegations of incompetency of his retained counsel are wholly unsupported by the record of trial. During the course of the six-day trial, both

[2] *Panchella* v. *United States*, 41 F. Supp. 850 (E.D. Pa. 1941), cited by petitioner (Pet. 12), is inapposite because the trial court's instruction followed the state rule in that case, see *United States* v. *Marcus*, 166 F. 2d 497, 504, note 5 (C.A. 3). *Reavis* v. *United States*, 93 F. 2d 307 (C.A. 10), cited by petitioner, is inapposite because it held that a directed verdict of acquittal should have been entered due to the insufficiency of the evidence, noting that it was error to criticize the defense of alibi in the absence of an instruction that alibi is a complete defense (93 F. 2d at 309).

defense counsel were active on petitioner's behalf. They conducted extensive cross examination of government witnesses in order to test the accuracy and credibility of the testimony given (Tr. 28–33, 62–63, 69–72, 89–95, 154–156, 225, 260–265, 354–364, 544–545). Petitioner complains that his counsel did not cross examine enough, but overlooks the fact that most of the cross examination conducted by Garrett's counsel was directed to areas involved in petitioner's case, and further cross examination, in many instances, would have been repetitive. Petitioner also assails counsel for their failure to object at various times (Pet. 10), but fails to show any valid basis for objection.

At the beginning of the defense case, an extensive and detailed opening statement was made (Tr. 591–595). Petitioner's counsel called three witnesses to establish the defense of alibi, and then let petitioner develop his version of this case (Tr. 595–602, 605–607, 608–611, 613–618, 621–629, 631–632, 633–641, 663–664). The fact that the jury convicted petitioner is not surprising in view of the overwhelming evidence of his guilt, particularly the positive identification of petitioner as the robber, made by the victims and eyewitnesses (Tr. 27–28, 60–62, 286–287, 300–303). Under the circumstances of this case the conviction is no reflection on the competence of defense counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner for a writ of certiorari should be denied.

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